FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*,

v.

JESSE RODRIGUEZ, MODESTO HERRERA, and SADRACH PEREZ, *Respondents*.

REPLY BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
ARGUMENT	3
I. The Respondents' Brief Illustrates The Confusion Which Results From An Appellate Class Certification Based Upon An Incomplete Record	3
II. Respondents Have Not Addressed The Question Raised In This Case Of The Proper Burden Of Proof In A Title VII Case	10
III. Plaintiffs' Attempts To Cure The Inadequacies Of Their Case By Reference To The Record In Another Lawsuit Should Be Disregarded By The Court	15
CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

American Bemberg Corp. v. United States, 253 F.2d 691 (3rd Cir. 1958)	18
Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973)	3, 4
Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975)	5
Claasen v. United States, 142 U.S. 140 (1891)	18
Clark v. Paul Gray, Inc., 306 U.S. 583 (1939)	18
Coalition v. Brinegar, 518 F.2d 522 (4th Cir. 1975)	18
Duran v. United States, 413 F.2d 596 (9th Cir. 1969), cert. denied, 396 U.S. 917 (1969)	18
Henneford v. Northern Pacific Railway Co., 303 U.S. 17 (1938)	18
Hertz v. Graham, 23 F.R.D. 17, 20 (S.D.N.Y 1958)	18
Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975)	3, 5, 6

Page

Johnson v. Shreveport Garment Co., 13 FEP Cases 1677 (W.D. La. Nov. 18, 1976) 5, 13

Lewis v. Philip Morris, Inc., — F.Supp. —, 13 FEP Cases 104 (E.D. Va. July 7, 1976) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10

Mandujano, et al. v. Basic Vegetable Products, 541 F.2d 832 (9th Cir. 1976) 9

Nance v. Union Carbide Corp., — F.2d —, 12 CCH EPD ¶ 11,106 (4th Cir. 1976) 4

Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968) 8, 9

Saunders v. Shaw, 244 U.S. 317 (1917) 7

Schley v. Pullman's Palace Car Co., 120 U.S. 575 (1887) 18

Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976) 3, 4

Seward v. South Florida Securities, Inc., 96 F.2d 964 (5th Cir. 1938) 18

Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991, decision on remand, 56 F.R.D. 420 (N.D. Ill 1972) 6

Thomson v. Gaskill, 315 U.S. 442 (1942) 18

United States v. Addonizio, 449 F.2d 100 (3rd Cir. 1971) 18

United States v. Armour & Co., 402 U.S. 673 (1971) .. 19

United States v. East Texas Motor Freight, Teamsters Union and Machinists Union 10 CCH EPD ¶ 10,345 (N.D. Tex. May 28, 1975) 15, 17, 18

United States v. Sinor, 238 F.2d 271 (5th Cir. 1956), cert. denied, 353 U.S. 985 18

United States v. Wood, 295 F.2d 772 (5th Cir. 1961) 18

Page

ARTICLES:

Developments—Class Actions, 89 Harv. L. Rev. 1319 (1976) 5, 8

A System of Judicial Notice Based on Fairness and Convenience, Perspectives of Law, 69 (1964) 19

STATUTES:

42 U.S.C. § 1981 ..... 2, 4

42 U.S.C. § 2000(e)-2(j) 15

42 U.S.C. § 2000(e)-6 16

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 19 19

Rule 23 ..... 2, 3, 9

Rule 23(a) 8, 10

Rule 23(b) 8, 10

Rule 23(c)(1) 3, 6

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Despite its bulk and righteous tone, the Respondents' brief does not address the issues raised by ETMF's Petition for *Certiorari* or the arguments made in the ETMF's brief. Rather, the Respondents have misrepresented ETMF's arguments and have attempted to reply to the arguments it wishes ETMF had made. Furthermore, the Respondents have asked the Court to find facts based on testimony in the record which had

apparently been discredited by the trial judge and to take judicial notice of evidence submitted in a subsequent trial in different litigation and at which ETMF was not an active participant.

This case raises serious legal questions concerning the proper application of Rule 23 of the Federal Rules of Civil Procedure and the allocation of the burden of proof in Title VII class actions. These questions would not have been raised but for the Court of Appeals' desertion of its appellate function. The Court of Appeals decided factual, procedural, and legal questions which, by virtue of the Plaintiffs' trial strategy, had not been submitted to the trial court for initial decision. Further, the appellate court overturned findings of the trial court even though those findings were supported by the record and were not clearly erroneous and even though the trial court's conclusion reflected a correct application of the law. In light of the named Plaintiffs' apparent abandonment of the class, the trial judge correctly refused to bind non-present persons to the judgment. The trial court's conclusion that ETMF had not discriminated against the named Plaintiffs was correct in that Plaintiffs' theory of liability required an initial finding of discrimination in hiring which the Plaintiffs failed to prove. Indeed, Plaintiffs stipulated to the contrary. (App. 417(1)) Alternatively, the District Court properly concluded that the Plaintiffs were not qualified to be over-the-road drivers and, therefore, were not harmed by the alleged lock-in effect of ETMF's policies and thus were not entitled to recover under Title VII of the Civil Rights Act, or 42 U.S.C. § 1981. The Respondents have not addressed the serious questions raised by this case but seek to distract the Court by its emotional plea for affirmance.

ARGUMENT

I. THE RESPONDENTS' BRIEF ILLUSTRATES THE CONFUSION WHICH RESULTS FROM AN APPELLATE CLASS CERTIFICATION BASED UPON AN INCOMPLETE RECORD.

Rather than respond to ETMF's legal arguments that Rule 23(c)(1) requires that Plaintiffs take the initiative to secure the early certification of the class by the trial court, Respondents argue simply that ETMF and the Union Defendants were not prejudiced by these errors. Respondents assert that in this case, as in *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), and in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973), all parties understood that the cases were being litigated as a class action. (Resp. Br. at 35).[1] For the reasons stated in our brief in chief, ETMF believes that the mandate of Rule 23(c)(1) is ordinarily absolute. (ETMF Br. at 13-29). The Plaintiffs must submit the class question, and a certification decision must be made early in the litigation so that the record is clear with respect to the scope of the dispute between the parties. Assuming *arguendo* that there are certain cases in which the failure of the District Court to abide by the mandate of Rule 23(c)(1) is harmless error, *see Jimenez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975), in the instant litigation, the confusion and prejudice to the Defendants is manifest in Respondents' own brief.

The pre-trial order, upon which Plaintiffs rely in support of their argument that everyone understood that the case was being tried as a class action, was drafted well in advance of trial and was served upon

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[1] References to the Respondents' brief will appear: Resp. Br. References to East Texas Motor Freight's brief will appear: ETMF Br.

the opposing parties on January 12, 1973. Respondents neglect to point out that all of the Defendants' proposed pre-trial orders, expressly denying the appropriateness of the class action, were filed and made a part of the record at the same time. (Docket Entries at 48, 49, 50, 51; App. at 4, 117). More importantly, on the very morning of trial, the Plaintiffs stipulated that the only issue presently before the court was "whether the failure of the Defendant, East Texas Motor Freight, to consider Plaintiffs' line-driver applications constituted a violation of Title VII and 42 U.S.C. § 1981." (App. at 113-118). Surely, the Defendants were justified in believing that this Agreement superseded the proposed pre-trial order which had been drafted several weeks before. Thus, this case is distinguishab'e from *Senter* and *Bing, supra,* and is more similar to *Nance* v. *Union Carbide Corp.,* — F.2d —, 12 CCH EPD ¶ 11,106 (4th Cir. 1976), in which the Court refused to certify a case as a class action in the face of stipulations in the record by the Plaintiff that she did not intend to bring a class action. *Id.* at pp. 5112-5113.

The appellate certification of the class prejudiced the Defendants in two ways. Defendants were deprived of the opportunity to present evidence and legal arguments concerning the appropriateness and scope of the class. Secondly, Defendants were deprived of the opportunity to present evidence tending to refute the allegations of class discrimination.

The arguments contained in Respondents' brief concerning the appropriateness of the broad class should have been made in the first instance to the trial judge. (*See* Resp. Br. at 43). Indeed, Respondents admit that some of the arguments which ETMF would have made to the District Court judge might justify narrowing

the scope of the class or the establishment of subclasses. (Resp. Br. at 45).

Despite the Respondents' misconstruction of ETMF's argument, ETMF is not asking this Court to make the determination as to the appropriateness of the class. As this case makes abundantly clear, the determination of the nature and scope of the class is uniquely suited to determination by the trial judge and is simply inappropriate for consideration at the appellate level. Indeed, the experience of the federal courts with class actions, both under Title VII of the Civil Rights Act and under other remedial legislation, indicates that the District Courts should exercise greater discretion in the formation of the class and conduct of the class lawsuit. *See* argument, pp. — *infra. See generally, Developments—Class Actions,* 89 Harv. L. Rev. 1319 (1976).

ETMF believes that in light of Plaintiffs' trial strategy, the District judge properly regarded the class as having been abandoned and, thus, dismissed the class allegations. *See Johnson* v. *Shreveport Garment Co.,* — F. Supp. — 13 BNA FEP 1677 (W.D. La. Nov. 18, 1976 (class decertified in decision on merits because plaintiffs' counsel had not adequately represented class). If this was indeed legal error, the proper appellate remedy would have been to remand the case to the District Court with guidance concerning the issues to be resolved and the standards to be applied in making the class determination. With such guidance, the District Court could have proceeded to trial on the merits if the class had been certified. *See Burns* v. *Elrod,* 509 F.2d 1133, 1136-37 (7th Cir. 1975).

Jimenez v. *Weinberger, supra,* cited by the Respondents for the proposition that post-trial certification

should be allowed, is clearly distinguishable. The primary issue in *Jimenez* was whether a portion of the Social Security Act was constitutional. *See* 417 U.S. 628 (1974). The *Jimenez* case was remanded in order to allow the Plaintiffs to establish their eligibility under the Act. 417 U.S. at 137-38. On remand, the District Court found that the Plaintiffs were eligible and certified the case as a class action. The Court of Appeals affirmed on the basis that the certification would have been proper had it come prior to the decision on the merits; that mere delay in certification did not deprive the *District Court* of its *power* to enter the order and that the intervening appeal and remand did not deprive the Court of that power. 523 F.2d at 699. The Court of Appeals then determined that the District Court's breach of Rule 23(c)(1) did not constitute reversible error. The key to the Court of Appeals' decision on the latter point was that the belated certification of the class did not prejudice the Defendant government because the government could not relitigate the issue of the constitutionality of the statute in a subsequent class action. *Id.* at 701.

Similarly, in *Sprogis* v. *United Airlines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the Court of Appeals held that the District Court had the power to certify the class after trial "where justice requires." *Id.* at 1201. On remand, however, the District Court refused to exercise that power because, among other reasons: "The issues in *Sprogis* have been decided without considering the claims of other members of a purported class." 56 F.R.D. 420, 423. In this case, too, the issues at trial were related to the individual Plaintiffs, and post-trial certification has severely prejudiced the Defendants.

Had the instant case been certified before trial on the merits by the District Court judge, in a manner identical to the class certified by the Fifth Circuit on appeal, the Defendants would have submitted statistical and demographic evidence which would tend to show that there was no discrimination in the initial hire of the Plaintiff class. Also, ETMF would have introduced evidence concerning the hiring practices at each of the terminals in Texas. The Respondents' attempts to represent this case as one which has been tried as a class action are limited to pointing to bits of evidence in the record which might also have been introduced in a class action. The mere existence of facts which are material to certain class claims as well as relevant to certain individual claims does not make the case one tried as a class action. There are many items of proof which are material to the question of whether ETMF was liable to members of a class of city drivers as well as material to whether ETMF had discriminated against the individual Plaintiffs. The right of a Defendant to know the nature and extent of the claims against it is fundamental to due process. *Saunders* v. *Shaw*, 244 U.S. 317 (1917). Those factors weigh heavily in the choice and extent of testimony, exhibits, research, and the development of litigation strategy which allow counsel to effectively present his or her case without wasting judicial time with the introduction of unnecessary evidence. The Defendants were deprived of that knowledge in this case. This Court should reinstate the judgment of the District Court or, in the alternative, order a new trial should it find that the District Court's dismissal was improper.

The experience of the courts with class actions under Title VII indicates that the District Court judge

should apply the requirements of Rule 23(a) and (b) with great care in Title VII cases. The approach adopted by the Fifth Circuit actually frustrates the purpose of class actions: to settle in one lawsuit the greatest number of claims with due regard for the rights of all affected persons whether or not they are members of the class. *See generally, Developments-Class Actions, supra.*

For example, one of the early class actions under Title VII was *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). In *Quarles,* the class was described as "all blacks employed therein." The *Quarles* court determined that the Stemmery employees were not discriminated against by the Company's employment policies. *Id.* at 519. Later, certain black Stemmery employees brought suit alleging violations of Title VII presumably disposed of in the *Quarles* suit. *Lewis* v. *Philip Morris, Inc.*, — F. Supp. —, 13 BNA FEP 104 (E.D. Va. July 7, 1976). Judge Merhige refused to bind the Plaintiffs in *Lewis* to the *Quarles* finding, saying:

> Although the class in *Quarles* did include Stemmery employees, indeed the named plaintiffs in that case were former Stemmery employees who had transferred to the Prefabrication Department, the claims of the Stemmery employees were seemingly lost in the breadth and ambition of the class's overall interest. *Quarles,* which was one of the early resolutions of a Title VII controversy, reflects in its opinion and documents contained in the case file that the plaintiffs therein were, in part, seeking to secure equal benefits for what readily appeared to be a deserving class—the black *permanent* employees of the Company.
>
> * * *

> The *Quarles* opinion, authored by now United States Circuit Judge John D. Butzner, was and is one of the monumental decisions in the area of Title VII law for its astute realization that practices that are currently neutral may, in effect, perpetuate past discriminatory practices. It suffers, however, from the plaintiffs' attempt to include a broad class of litigants and yet prepare and advocate with force the claims of some class members to the detriment of a distinct and aggrieved alternative portion of the class. 13 FEP at 108.

Similarly, the Court of Appeals for the Ninth Circuit recently found it necessary to overturn the settlement of a Title VII class action, partially because of potential conflicts among the members of the broad class of: "[A]ll past, present, future and potential applicants of Basic who are Negroes, Asians, American Indians, Spanish-surname Americans or females." *Mandujano, et al.* v. *Basic Vegetable Products,* 541 F.2d 832 (9th Cir. 1976).

The foregoing cases illustrate the problems which will continue to result if the Court endorses the cavalier, broad brush approach to class actions brought under Title VII which the Fifth Circuit has adopted. Rather, the function of certification of the class should remain with the trial judge. Plaintiffs who initiate class actions should be required to present the class question to the trial court to facilitate an early determination by the trial court pursuant to the standards of Rule 23. This procedure is consistent with due process and efficient judicial administration. Problems resulting from an ambiguous trial record would be avoided. In making the class action determination, the District Court should be mandated to carefully apply the re-

quirements of Rule 23(a) and (b) in order to best protect the interests of the Defendants, the named Plaintiffs, and the members of the alleged class.

II. RESPONDENTS HAVE NOT ADDRESSED THE QUESTION RAISED IN THIS CASE OF THE PROPER BURDEN OF PROOF IN A TITLE VII CASE.

Respondents devote a substantial portion of their brief to refuting a perceived argument that the standards of proof in a Title VII class action should be the same as those announced in the Supreme Court's decision in *McDonnell Douglas Corp* v. *Green,* 411 U.S. 792 (1973). A fair reading of ETMF's brief reflects that ETMF does not rely exclusively on *McDonnell Douglas* but argues that in a Title VII class action, a *prima facie* showing of a violation in Title VII must include:

1. That the neutral policy in question has a disproportionate impact on members of a minority group which is causally relaxed to their race, religion, color, sex or national origin. Statistical evidence, properly considered, will show the disparate impact and may give rise to an inference of causation if no other factors satisfactorily explain the disparity. (ETMF's Br. at 40-48).
2. That the plaintiff class viewed as an entity has been adversely affected in their employment because of the challenged policies. That is, that there exist persons in the class who are qualified to perform the job and who were available for employment at the time the employer had vacancies in the desired category. (ETMF's Br. at 49-55).

The Court of Appeals in its decision and the Respondents in their brief have utilized numbers or "statistics" in a manner that ignores their validity as the basis for an evidentiary inference. The Court of Appeals inferred from the statistics introduced by the Plaintiff-Respondents that ETMF had discriminated against members of the plaintiff class in hiring road drivers. However, the data relied upon by the Court of Appeals and the Respondents do not support this inference for two reasons: Plaintiffs have not shown that the employment figures which they have introduced would be unlikely to result from a series of hiring decisions untainted by considerations of race or national origin. Therefore, they have not established a causal relationship or nexus between the statistic and the fact they are attempting to establish. Secondly, plaintiffs have not shown that the members of the class of ETMF city drivers in the State of Texas were the victims of the alleged discrimination in hiring. Thus, they have not established a nexus between the statistical inference and the plaintiff class on whose behalf the evidence is being offered. The aggregate effect of the Respondents' approach is that the "statistics" do not measurably assist the trial court in resolving the disputed fact or in determining whether the inference is relevant to the claims of the plaintiff class.

Respondents' simplistic comparison of ETMF's employment figures to the ratio of blacks and Spanish-speaking persons in the metropolitan area surrounding each facility does not tend to establish, without more, that ETMF discriminated at a particular facility or group of facilities on the basis of race or national origin. The Respondents did not offer and the Court of Appeals did not require proof that the labor market for the facility was essentially conterminous with the population pool reflected by plaintiffs' statistics. Similarly,

the record lacks evidence that the racial and ethnic profile of the population pool accurately reflects the racial and ethnic profile of the qualified and available labor market within which the employer could reasonably be expected to recruit. Both of these considerations are nuclear elements of any inference to be drawn from the bare statistics. The Plaintiffs-Respondents must have the burden of initially establishing each element underlying the inference before the defendant may be called upon to contest its presumptive validity. Respondents are seeking to shift the burden to the defendant to rebut an inference before it is established. As a result the failure to rebut *creates* the inference and the burden of proof has been totally and improperly shifted to the defendants and it is thereby invested with the unfair task of establishing a negative proposition, *i.e.*, there is no statistical basis for an inference of class liability.

The statistical arguments raised on pages 66-67 of respondents' brief were never presented to the trial court and thus never considered in the class context. However, they exemplify the fallacy inherent in respondents' novel approach to proof in an adversary proceeding. They compare ETMF's employment data and the 1970 census population data for the surrounding metropolitan statistical areas. The plaintiffs point to Longview, Texas, a city which they claim has 20% minority population. This figure appears to be based upon the 1970 census figures. The 1972 compliance data included in the Appendix at pages 395-398 for that city indicate that there were 28 city drivers at the Longview terminal, all of whom were hired before 1970. There is no evidence concerning the minority population of Longview in the 1940's, '50's, or '60's, when all

of these persons were hired. Furthermore, the plaintiffs ask the Court to compare ETMF's hiring data with the gross population statistics for the surrounding metropolitan area. There is no reason that such a comparison is appropriate. The standard metropolitan statistical area is simply a statistical construct used by the Bureau of Census. There is no basis to conclude that the standard metropolitan statistical area is necessarily congruent with the geographical area which would normally be the labor market for the ETMF city terminal in Longview. Nor is there any indication that the minority population of Longview presents the same ratio of minorities to whites as the available work force. *See Johnson* v. *Shreveport Garment Co.*, *supra* at 1686-88.

Equally important and endemic to both the decision of the Court of Appeals and the respondents' brief is the failure to condition the legitimacy and relevance of the statistical inference on an evidentiary showing that the plaintiff class in this litigation was adversely affected by the factual finding that is the subject of the inference. The plaintiff class is composed of a finite number of individuals who were initially employed at various facilities of the respondent employer. The essence of the respondents' legal theory is that at the time they were hired they were precluded from employment as road drivers. Otherwise, the subsequent application of neutral employment and seniority practices were non-discriminatory. Notwithstanding the centrality of hiring discrimination to their claim, no evidence was introduced, and no evidence was required, to establish that the plaintiff class was the object of discrimination in hiring. Ironically, the individual plaintiffs, by stipulation, conceded they were employed in a non-

discriminatory manner. The Court of Appeals created a *prima facie* case without record evidence sufficient to establish that the plaintiff class was adversely affected by the statistical inference of discrimination. The respondents' brief is silent on this point and impliedly would have the Court adopt a standard of proof that would find liability to the class without evidence of injury to the class. Assuming *arguendo* that an employer is guilty of hiring discrimination on the basis of race at a specific facility, under respondents' and the Court of Appeals' approach it is *ipso facto* liable to every person of that race wherever found. Once again, the respondents are attempting to establish a critical constituent element of their cause of action by negative inference, *i.e.*, the employer has not proved that the plaintiff class was not discriminated against.

Thus, the respondents' reliance on undifferentiated population statistics as the totality of their *prima facie* case emasculates plaintiffs' burden of proof and permits a finding of liability without the requisite showing that the statistic supports the inference and that the inference adversely impacted the plaintiff class. The adversary process has been turned on its head without justification by the Court of Appeals or explanation by the respondents.

In reality, the Plaintiffs are asking the Court to articulate a burden of proof which would state that Defendants are presumptively liable under Title VII if their work force does not reflect the same proportion of minority persons as the population of the standard metropolitan statistical area at the time of the latest census. In essence, the Plaintiffs are asking the Court to disregard the plain wording of Title VII which provides in applicable part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section or other area or in the available work force in any community, state, section or other area. 42 U.S.C. § 2000(e)-2(j).

III. PLAINTIFFS' ATTEMPTS TO CURE THE INADEQUACIES OF THEIR CASE BY REFERENCE TO THE RECORD IN ANOTHER LAWSUIT SHOULD BE DISREGARDED BY THE COURT.

Respondents, aided by their *amicus* the NAACP Legal Defense Fund, Inc., seek to overcome the deficiencies of the evidence in this case by asking the Court to take judicial notice of the facts adduced at trial in the case of *U.S.* v. *East Texas Motor Freight & Int'l. Brotherhood of Teamsters*, 10 CCH EPD ¶ 10,345 (N. D. Tex. May 28, 1975). It seems singularly inappropriate for respondents who argue that they have met their burden of proof below to seek to admit for the first time in the Supreme Court evidence introduced at a later trial in a different court, between different parties.

In *United States* v. *East Texas Motor Freight*, the United States of America filed suit against ETMF, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the International Association of Machinists and Aerospace Workers alleging that the Defendants were en-

gaged in a "pattern and practice" of discrimination in violation of Title VII of the Civil Rights Act and Executive Order No. 11246. *See* 42 U.S.C. § 2000(e)-6. The allegations concerned employees throughout East Texas Motor Freight's system and were not confined, as was the case in the proceedings below, to employees in the State of Texas. On February 18, 1974, ETMF entered into a Consent Decree in partial resolution of the suit initiated by the United States. In the Consent Decree subsequently approved by Judge Hughes, it was stated that "This Decree shall be binding upon the parties hereto, and it is their intention to fully settle by this Decree all issues raised by the Plaintiffs in its Complaint and occurring prior to the entry of this Decree." (App. at 424-25). The Union Defendants were not parties to the Consent Decree, and the case went to trial solely on issues relating to the collective bargaining agreements and the liability of the Union Defendants. Prior to that trial in a stipulation between the United States and the Defendant East Texas Motor Freight, the employer agreed that it "will not introduce evidence herein showing that business necessity requires denying incumbent Affected Class members the right to transfer to road driving or other positions and to carry over their seniority to such positions, for all purposes." (App. at 447). Thus, the procedural posture of the case was such that there was no purpose for East Texas Motor Freight to participate actively in that trial as an adversary of the United States. In fact, ETMF stipulated that it would not even introduce evidence on a central issue in the second phase of this litigation.

District Judge Hughes recognized East Motor Freight's limited participation at the trial of the seniority issues and held in her order setting forth findings of fact and conclusions of law that:

> The foregoing Order applies solely to the Unions. And the position of the Plaintiffs and Defendant East Texas Motor Freight Lines, Inc., as between them, continues to be controlled by the terms of the Court's Consent Decree of February 18, 1974, which remains in full force and effect. . . . This Order constitutes and completes adjudication of all claims of Plaintiffs against both Defendant Unions, assessing all costs equally between the Government and Defendant Teamsters.

United States v. *East Texas Motor Freight, Teamsters Union and Machinists Union*, 10 CCH EPD ¶ 10,345 at 5418 (N.D. Tex. 1975).

The District Court, in that opinion, made reference to the Consent Decree as providing "full and complete" relief against East Texas Motor Freight. It was the claims of the Plaintiff against the Unions that had been left unresolved, and the trial was on issues litigated solely between the United States and the Teamsters. Because East Texas Motor Freight voluntarily settled all its disputes with the government prior to the second phase of the litigation and thereby utilized the preferred method of resolving claims under Title VII of the Civil Rights Act, it had no reason to and, as a result, did not challenge the authenticity of physical evidence and the credibility of the witnesses who testified in the trial of *United States* v. *East Texas Motor Freight*. When viewed in the circumstantial perspective of the second phase of the *United States* v. *East Texas Motor Freight* litigation, there is no merit to the contention of Petitioners and *amicus* that it is appropriate for the Court herein to adopt evidence submitted in *United States* v. *East Texas Motor*

Freight to bolster the record made by the Plaintiff in the District Court against East Texas Motor Freight. *Cf. Hertz* v. *Graham*, 23 F.R.D. 17, 20 (S.D.N.Y. 1958).

There has been a longstanding judicial reluctance to accept evidence *dehors* the record. *See, e.g., Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589-90 (1939); *Henneford* v. *Northern Pacific Ry. Co.*, 303 U.S. 17, 19 (1938); *Claasen* v. *United States*, 142 U.S. 140, 148 (1891); *Schley* v. *Pullman's Palace Car Co.*, 120 U.S. 575, 578 (1887); *Coalition* v. *Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975) (reviewing court will not consider and weigh after-discovered evidence); *United States* v. *Addonizio*, 449 F.2d 100, 103 (3rd Cir. 1971) ("It is 'hornbook law' that a court of appeals may consider only facts of record, and it is the record alone which controls the facts") (citing many federal cases); *Duran* v. *United States*, 413 F.2d 596, 605 (9th Cir. 1969), *cert. denied*, 396 U.S. 917 (1969); *United States* v. *Wood*, 295 F.2d 772, 775, n. 3 (5th Cir. 1961); *American Bemberg Corp.* v. *United States*, 253 F.2d 691, 694 (3rd Cir. 1958); *United States* v. *Sinor*, 238 F.2d 271, 277 (5th Cir. 1956), *cert. denied*, 353 U.S. 985 (appellate court cannot give credence to factual recitals which might have been made but were not presented to the trial court); and *Seward* v. *South Florida Securities*, 96 F.2d 964-65 (5th Cir. 1938).

The basis for this well-established judicial policy was recently articulated by Professor Kenneth Culp Davis and incorporated into the Advisory Committee's notes to Federal Rule of Evidence 201 which governs the question of judicial notice:

> The reason we use trial-type procedure, I think, is that we make the practical judgment on the basis of experience, that taking evidence subject to cross-examination and rebuttal is the best way to resolve

> controversies involving disputes of adjudicated facts, that is, facts pertaining to the parties. The reason we require determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation and argument (either written or oral or both). They key to a fair trial is opportunity to use the appropriate weapon (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention. *A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law.* 69, 93 (1964).

Notes of Advisory Comm. on Federal Rules of Evidence, Rule 201, 28 U.S.C.A. Fed. R. Evid. pp. 54-55 (1975 e.d.).

The evidence that Respondents and *amicus attempt* to introduce for the first time before the Court has not been previously tested in a truly adversary proceeding. More importantly, it was submitted in an adversary proceeding in which the party against whom it is presently offered, East Texas Motor Freight, was not an active litigant. East Texas Motor Freight, in its Consent Decree, settled the claims raised by the government in this litigation. ETMF was entitled to the benefits of that settlement. *United States* v. *Armour Co.*, 402 U.S. 673, 681-82 (1971). At the subsequent trial, its status was analogous to that of the person joined in a lawsuit under Rule 19 of the Federal Rules of Civil Procedure because "in his absence complete relief cannot be accorded among those already parties." The District Court recognized this and specifically excluded East Texas Motor

Freight from the precedential effect of the final order. Therefore, none of the safeguards which support the limited exceptions to the tradional restraints against embellishing the record are present in this case. Both the Court of Appeals and the Respondents have attemped to recast the litigation as it was tried in the District Court, and transmute the record into a shape more amenable to the objectives they seek. This is a distortion of the appellate process and derogation of the adversary process.

Plaintiffs' constant refrain throughout this litigation has been that the trucking industry has been found liable in other cases. Now, the Respondents claim that East Texas Motor Freight has been found liable in another case which it had settled without admission of liability and, therefore, that they are entitled to recovery also. This theme is seen again in Respondents' brief at pages 69-70 where Respondents say:

> Petitioners seek to deflect, but do not meet, the main thrust of Respondents' case: ETMF's refusal to employ minority line drivers systemwide meant that Plaintiffs would have been hired as city drivers regardless of where they had initially applied.

It is clear that Respondents have missed the entire thrust of East Texas Motor Freight's argument concerning the burden of proof in a Title VII case. We assert that the Plaintiffs in a class action must prove more than the fact that the Defendants have discriminated against members of a certain race or national origin and that all of the class members are also members of that larger racial or national origin group. The named Plaintiffs must prove that the members of the

Plaintiff class were actually victims of that discrimination. Absent such a showing, there can be no recovery under Title VII of the Civil Rights Act.

CONCLUSION

For the reasons stated in Petitioner East Texas Motor Freight's brief on the merits and for further reasons contained herein, Petitioner East Texas Motor Freight respectfully prays that the decision of the Court of Appeals be reversed and the decision of the District Court be reinstated.

Respectfully submitted,

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